to the injury is in any way different when he remains quiescent in a position of peril, or when he continues to move along in a zone of peril, the actual risk in each case being the same. The distinction contended for might serve to determine when the actual "peril" arises,[19] but as a means of ascertaining the decisiveness of such negligence in the ultimate result it savors of the "degree" test of comparative negligence rather than of the "effect" test of contributory negligence.[20]

The dissenting opinion in *Nehring* v. *Connecticut Co.*, while repudiating the distincton between "active" and "passive" negligence, holds that the question of the plaintiff's contributory negligence was one for the jury, making no distinction between the defendant's negligent act after discovery of the peril and his negligence in merely failing to discover it. A similar confuson has led many jurisdictions to charge a defendant in a situation where both parties through neglect have failed to become apprised of the situation.[21] This result does not seem justifiable on principle, for when neither party has discovered the peril the breach of duty by each is the failure to exercise due care to discover it, and enforcement of liability against the defendant for his lack of viligance ignores the plaintiff's similar delinquency in this regard.[22] In the absence of a supervening act of discovery by either, the negligence of each is concurrent, and, it would seem, equally productive of the final result.[23] On considerations of policy, however, apart from principles of contributory negligence, a recovery should be had against a defendant engaged in the use of a dangerous instrumentality, by reason of the greater duty of care enjoined upon him.[24]

THE PRIVILEGE AGAINST SELF-INCRIMINATION AND THE POLICE POWER.—The privilege against self-incrimination is guaranteed by the United States Constitution, and by all but two of our State constitutions[1] with slightly varying language, but with the same general intent, to secure the individual from compulsory disclosure of his criminal guilt. The typical situation in which the immunity is invoked, is

[19]For the degree of activity in the conduct of the plaintiff may well have a different effect in bringing a realization of the danger home to the motorman. *Cf.* n. 3 *supra.*

[20]In Indiana the rule set forth in the principal case that "active" negligence on the part of the plaintiff would defeat a recovery, notwithstanding the want of care by the defendant after discovery of the situation, as enunciated in Robards *v.* Ind. St. Ry. Co. (1903) 32 Ind. App. 297, was apparently abandoned in a later case. Ind. St. Ry. Co. *v.* Bolin (1906) 39 Ind. App. 169. See 5 Mich. L. Rev. 143.

[21]Denver City Tramway Co. *v.* Wright (1910) 47 Colo. 366; P. & R. Ry. Co. *v.* Klutt (1906) 148 Fed. 818.

[22]Bourrett *v.* C. & N. W. Ry. Co. (1911) 152 Ia. 579; Dyerson *v.* U. P. R. R. Co. (1906) 74 Kan. 528.

[23]San Antonio Traction Co. *v.* Kelleher (1908) 48 Tex. Civ. App. 421; 16 Va. L. Reg. 161, 166.

[24]See Kolb *v.* St. L. Transit Co. (1903) 102 Mo. App. 143.

[1]In New Jersey and Iowa the rule is given full force as a part of the existing law, see State *v.* Zdanowicz (1903) 69 N. J. L. 619; State *v.* Height (1902) 117 Ia. 650.

when a party or a witness in any judicial[2] or quasi-judicial[3] proceeding refuses to testify on the ground that his answer may furnish evidence for a criminal prosecution against himself. Unless the court is able to declare that the answer to the question asked could not reasonably have such a tendency, the propriety of the refusal cannot be questioned, and the immunity is absolute.[4] Furthermore, if a statute directs that a witness shall testify no matter what incrimination his testimony may reveal, such statute must go further and expressly stipulate not simply that this evidence shall be inadmissible against the witness in subsequent criminal proceedings,[5] but that no prosecution whatever shall be made in relation thereto.[6] Thus it is evident that in these classes of cases, the privilege is construed as a sweeping protection against even the most remote consequences of self-accusation; and such a construction seems both historically[7] and reasonably justifiable where the self-accusing information is sought to be extracted from a man upon the witness stand.

That the same rigorous protection should be thrown around the individual in all other situations would follow through an uncompromisingly rigid adherence to the interpretation as outlined above, but it would speedily lead to hopeless practical difficulties.[8] If, for instance, all information aimed at identification may be refused on the ground that, under easily conceivable circumstances, such information might prove a link in the conviction of the informant for some crime, the requirements of automobile license tags or perhaps of census reports would be constitutionally debatable. The case literature on this phase of the subject is comparatively scant, but the display of automobile license tags has been held a valid requirement in the exercise of the police power,[9] and the law requiring druggists to report their sales of liquor has also been approved, though their reports might show infraction of the penal statutes defining the conditions of its lawful sale.[10] In accordance with this view, a statute compelling the driver of a motor vehicle to stop and give his name and address in the event of his culpably or accidentally injuring persons or property was upheld in the recent case of *Ex parte Kneedler* (Mo. 1912) 147 S. W. 983, which disapproved the contrary conclusion of the New York Court

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[2]Counselman *v.* Hitchcock (1892) 142 U. S. 547; Emery's Case (1871) 107 Mass. 172; People *ex rel. v.* O'Brien (1903) 176 N. Y. 253.

[3]Emery's Case *supra;* Lamson *v.* Boyden (1896) 160 Ill. 613; Counselman *v.* Hitchcock *supra.*

[4]Burr's Trial (1807) Fed. Cas. No. 14692, *e; Ex parte* Irvine (1896) 74 Fed. 954; *Ex parte* Gauss (1909) 223 Mo. 277.

[5]Counselman *v.* Hitchcock *supra;* Emery's Case *supra;* People *ex rel. v.* O'Brien *supra;* People *v.* Argo (1908) 237 Ill. 173; State *v.* Quarles (1853) 13 Ark. 307; Higden *v.* Heard (1853) 14 Ga. 255; *contra,* Wilkins *v.* Malone (1860) 14 Ind. 153.

[6]Brown *v.* Walker (1896) 161 U. S. 591.

[7]4 Wigmore, Evidence § 2250.

[8]See Twining *v.* New Jersey (1908) 211 U. S. 78.

[9]People *v.* Schneider (1905) 139 Mich. 673; People *v.* Schoepflin (1912) 137 N. Y. Supp. 675. See People *v.* MacWilliams (N. Y. 1904) 91 App. Div. 176, where such a statute was upheld as good against the prohibition of the Fourteenth Amendment.

[10]People *v.* Henwood (1900) 123 Mich. 317; State *v.* Davis (1891) 108 Mo. 666.

while considering an identical statute in *People* v. *Rosenheimer* (1911) 70 Misc. 433, affirmed, two judges dissenting, 146 App. Div. 875. The latter court distinguished this case from those cited above in that here the information was to be given *after* the commission of the offense. The distinction, however, is of no value; for the giving of the name does not definitely fasten the crime on the automobilist, since the injury may have been accidental, and therefore the case differs from those above only in the degree of likelihood that the information may prove self-incriminatory; and certainly the druggist would not be excused from reporting *after* he had made an illegal sale. On the contrary, one of the plain objects of the legislation was to secure just that information. It would seem, then, that under a strictly orthodox reverence for this privilege, all these and probably many other police regulations would be void.

The Missouri decision, in adopting the dissenting view of Justice Ingraham in the *Rosenheimer* case, lays down a better and wiser rule. The rigid inhibitions of the Fourteenth Amendment and their counterparts in the organic law of the several States have become resilient under the common sense opportunism of the doctrine of the police power,[11] and no good reason appears why the same elasticity should not be read into the guaranties against self-incrimination. Indeed, the wisdom of the existence of this Constitutional privilege has often been seriously questioned.[12] It has no place in the statute law of England,[13] and was originally inserted in our charters of liberties to prevent the infliction of torture on persons accused of crime.[14] Both history and reason combine in reaching the conclusion that the public can be protected from reckless driving by the statute under consideration without offending against the spirit and the meaning of the Constitutional privilege.

STATUTORY DUTY AND THE ASSUMPTION OF RISK.—Whether the principle that an employer is absolved from civil liability to his servant for injuries resulting from defects of which the servant knew and the danger of which he appreciated[1] applies to risks allowed to exist in violation of a statute, is a question upon which American courts are most sharply divided.[2] In the recent case of *Fitzwater* v. *Warren* (1912) 48 N. Y. L. J. No. 29 it was held, upon grounds of public policy, that assumption of risk cannot be pleaded as a defense when the action is founded upon a breach of statutory duty; and this decision is highly important, for in reaching its conclusion the Court of Appeals necessarily overruled *Knisley* v. *Pratt*,[3] which has often been cited as a leading case for the opposite view.

There is a fundamental difference between the master's common law duties and those prescribed by statute, in that the former are wholly indemnitive, since a violation, however flagrant, results in no liability

[11]Freund, Police Power § 69.

[12]Twining *v.* New Jersey *supra;* 4 Wigmore, Evidence § 2251.

[13]See Twining *v.* New Jersey *supra.*

[14]4 Wigmore, Evidence § 2250.

[1]For a discussion of the elements of the defense, see 12 COLUMBIA LAW REVIEW 629.

[2]2 Bailey, Personal Injuries (2nd ed.) 961.

[3](1896) 148 N. Y. 372.